Information Note for
LegCo Panel on Financial Affairs

Issues relating to change in shareholding in PCCW Limited

Introduction

In response to the Panel's letter of 15 November 2006, the SFC provides the following additional information relating to the Code on Takeovers and Mergers ("The Code").

The Code

2. The SFC generally does not comment on specific cases due to confidentiality obligations. If a transaction is subject to or conditional upon a ruling of the Takeovers Executive of the SFC ("Executive") as to whether general offer obligations would be triggered under the Code as a result of the transaction, the parties to the transaction may disclose the Executive's ruling to provide information to the market. We set out below the relevant provisions in the Code regarding the requirements to make a mandatory general offer and normally how the SFC (the Executive) deals with an application for a ruling under the Code.

3. The requirements to make a general offer are set out in Rule 26 of the Code, where

(a) any person acquires, whether by a series of transactions over a period of time or not, 30% or more of the voting rights of a company;[or]

(b) two or more persons are acting in concert, and they collectively hold less than 30% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their

collective holding of voting rights to 30% or more of the voting rights of the company;

…

that person shall extend offers, on the basis set out in this Rule 26, to the holders of each class of equity share capital of the company,...".

4. If no person in a transaction acquires voting rights of a company so that he increases his voting rights from below 30% to 30% or above , then (a) above does not apply. (b) may become relevant if there are two or more persons acting in concert with collective voting rights crossing over the 30% threshold. Under the Definitions section of the Code, "Persons acting in concert comprise persons who pursuant to an agreement or understanding (whether formal or informal), actively co-operate to obtain or consolidate "control" of a company through the acquisition by any of them of voting rights of the company."

5. "Control" is defined in the Code as 30% or more of the voting rights of a company, irrespective of whether that holding or holdings gives de facto control.

6. Without prejudice to the general application of the above definition, persons falling within the 9 classes of presumption (as set out below) will be presumed to be acting in concert with others in the same class unless the contrary is established. This means that if any persons fall under any of the 9 classes of presumption[Note], the burden is on such persons to establish that they are not acting in concert. If such persons do not fall within these classes, then the burden is on the Executive to establish that they are acting in concert.

7. When there is any doubt as to whether a proposed course of conduct is in accordance with the Code, parties or their advisers may consult or seek rulings from the Executive. An application for a ruling can be made in the manner set out under Section 8 of the Introduction to the Code. Full details of the ruling being sought, identity of the relevant parties, material facts and issues for consideration should be set out in the application. The material facts should include, amongst others, a description of the proposed transaction, timetable, related regulatory

Note Please refer to pages 12 and 13 of Appendix 1.

requirements, reasons and commercial rationale for the transaction, description of the parties and their respective relevant shareholdings, chronology of events, the effect of the transaction on the parties, steps to be taken, if any, to safeguard the interests of the independent shareholders, and financing arrangements. The application should also come with a statement by the applicant certifying the truth, accuracy and completeness of the statements set out in the application and an authorization for the advisers to submit it to the Executive on its behalf.

8. Upon the receipt of such an application, the Executive will review the contents of the application, and consider the relevant facts and circumstances. Where necessary, the Executive may request for additional information on the case. In some cases the Executive may find it necessary to seek information from other interested parties before making a ruling. The Executive will then grant a ruling based on the representations made and information received. However, if any of the information provided or representations made is found to be misleading or there is any further material development, the ruling granted may be invalidated.

9. The relevant provisions in the Code are attached as **Appendix 1**.

Securities and Futures Commission
November 2006

CODE ON TAKEOVERS AND MERGERS

26 Mandatory offer

26.1 When mandatory offer required

Subject to the granting of a waiver by the Executive, when

(a) any person acquires, whether by a series of transactions over a period of time or not, 30% or more of the voting rights of a company;

(b) two or more persons are acting in concert, and they collectively hold less than 30% of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to 30% or more of the voting rights of the company;

(c) any person holds not less than 30%, but not more than 50%, of the voting rights of a company and that person acquires additional voting rights and such acquisition has the effect of increasing that person's holding of voting rights of the company by more than 2% from the lowest percentage holding of that person in the 12 month period ending on and inclusive of the date of the relevant acquisition; or

(d) two or more persons are acting in concert, and they collectively hold not less than 30%, but not more than 50%, of the voting rights of a company, and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than 2% from the lowest collective percentage holding of such persons in the 12 month period ending on and inclusive of the date of the relevant acquisition;

that person shall extend offers, on the basis set out in this Rule 26, to the holders of each class of equity share capital of the company, whether the class carries voting rights or not, and also to the holders of any class of voting non-equity share capital in which such person, or persons acting in concert with him, hold shares (see also Rule 36).

Offers for different classes of equity share capital must be comparable and the Executive should be consulted in advance in such cases. (See Rule 14.)

Notes to Rule 26.1:

1. Persons acting in concert

The majority of questions which arise relate to persons acting in concert. The definition of "acting in concert" contains a list of persons who are

presumed to be acting in concert unless the contrary is established. The following Notes illustrate how this Rule 26 and definition are interpreted by the Executive.

There may also be circumstances where there are changes in the make-up of a group acting in concert that effectively result in a new group being formed or the balance of the group being changed significantly. This may occur, for example, as a result of the sale of all or a substantial part of his shareholding by one member of a concert party group to other existing members or to another person. The Executive will apply the criteria set out below, and in particular in Note 6(a) and Note 7 to this Rule 26.1 and may require a general offer to be made even when no single member holds 30% or more.

2. Shareholders coming together to act in concert

Acting in concert requires the co-operation of two or more parties. Where a party has acquired shares independently of other shareholders, or potential shareholders, but subsequently comes together with other shareholders to co-operate to obtain or consolidate control of a company and their existing shareholdings amount to 30% or more of the voting rights of that company, the Executive would not normally require a general offer to be made under Rule 26.1. Such parties having once joined together however, the provisions of Rule 26.1 would apply so that:-

(a) if the combined shareholdings amounted to less than 30% of the voting rights of that company, an obligation to make an offer would arise if any member of that group acquired further shares such that total holdings of voting rights reached 30% or more; or

(b) if the combined shareholdings amounted to between 30% and 50% of the voting rights of that company, no member of that group could acquire shares which would result in acquisitions by the group amounting to more than 2% of the voting rights of the company in any 12 month period without incurring a similar obligation.

3. Banks

An arm's length agreement between a shareholder and a bank under which the shareholder borrows money for the acquisition of shares which gives rise to an obligation under this Rule 26 will not normally result in the bank becoming a concert party. However, see class (9) of the definition of acting in concert.

4. Shareholders voting together

The Executive will not normally regard the action of shareholders voting together on particular resolution as action which of itself should lead to an offer obligation, but that circumstance may be taken into account as one indication that the shareholders are acting in concert.

5. Directors of a company

The directors of companies opposing an offer, their advisers, and others acting in concert with them, should consult the Executive before the acquisition of any voting rights which might lead to the incurring of an obligation under this Rule 26.

(See also class (6) of the definition of acting in concert.)

6. Acquisition of voting rights by members of a group acting in concert

While the Executive accepts that the concept of persons acting in concert recognises a group as being the equivalent of a single person, the holdings of members and the membership of such groups may change at any time. This being the case, there will be circumstances when the acquisition of voting rights by one member of a group acting in concert from another member of the concert group or from a non-member, will result in the acquirer of the voting rights having an obligation to make an offer.

(a) Acquisitions from another member

Whenever the holdings of a group acting in concert total 30% or more of the voting rights of a company and as a result of an acquisition of voting rights from another member of the group a single member comes to hold 30% or more or, if already holding between 30% and 50%, has acquired more than 2% of the voting rights in any 12 month period, an obligation to make an offer will normally arise.

In addition to the factors set out in Note 7 to this Rule 26.1, the factors which the Executive will take into account in considering whether to waive the obligation to make an offer include:-

(i) whether the leader of the group or the largest individual shareholding has changed and whether the balance between the shareholdings in the group has changed significantly;

(ii) the price paid for the shares acquired; and

(iii) the relationship between the persons acting in concert and how long they have been acting in concert.

The Executive would normally grant the acquirer of such voting rights a waiver from such general offer obligation if:-

(i) the acquirer is a member of a group of companies comprising a company and its subsidiaries and the acquirer has acquired the voting rights from another member of such group of companies; or

(ii) the acquirer is a member of a group of persons comprising an individual, his close relatives and related trusts, and companies controlled by him, his close relatives or related trusts, and the acquirer has acquired the voting rights from another member of such group of persons.

(b) Acquisitions from non-members

When the group holds between 30% and 50% of the voting rights, an offer obligation will arise if there are acquisitions from non-members of more than 2% in aggregate in any 12 month period. When the group holds over 50%, subject to Note 17 to this Rule 26.1 no obligations normally arise from acquisitions by any member of the group. However, subject to considerations similar to those set out in paragraph (a) of this Note, the Executive may regard as giving rise to an obligation to make an offer the acquisition by a single member of the group of voting rights sufficient to increase his holding to 30% or more or, if he already holds between 30% and 50%, by more than 2% in any 12 month period.

(c) Calculation of highest price

For the purpose of calculating the highest price paid in the event of an offer under this Rule 26, the prices paid for voting rights transferred between members of a group acting in concert may be relevant where, for example, all voting rights held within a group are transferred to that member making the offer or where prices paid between members are materially above the market price.

7. Vendor of part only of a shareholding

Shareholders sometimes wish to sell part only of their holdings or a purchaser may be prepared to acquire part only of a holding. This arises particularly where an acquirer wishes to acquire under 30%, thereby avoiding an obligation under this Rule 26 to make a general offer. The Executive will be concerned to see whether in such circumstances the arrangements between the purchaser and vendor effectively allow the purchaser to exercise a significant degree of control over the retained voting rights, in which case a general offer would normally be required. These concerns will also apply when the purchaser is already a member of a group acting in concert with the vendor, or when the purchaser joins such a group.

The Executive will also take into account any other transactions between the purchaser and the vendor, and between the purchaser and other members of the group acting in concert with the vendor. This could include, for example, the aggregation of transfers of voting rights to the purchaser over a period of time, or arrangements which have an effect similar to transfer, such as the underwriting by a purchaser of a rights issue which the vendor has agreed not to take up, or a placing of shares with the purchaser.

A judgement on whether such a significant degree of control exists will obviously depend on the circumstances of each individual case, but, by way of guidance, the Executive would regard the following points as having some significance:-

(a) there would be less likelihood of a significant degree of control over the retained voting rights if the vendor was not an "insider";

(b) the payment of a very high price for the voting rights would tend to suggest that control over the entire holding was being secured;

(c) if the parties negotiate options over the retained voting rights it may be more difficult for them to satisfy the Executive that a significant degree of control is absent. On the other hand, where the retained voting rights are in themselves a significant part of the company's capital (or even in certain circumstances represent a significant sum of money in absolute terms) a correspondingly greater element of independence may be presumed; and

(d) it would be natural for a vendor of part of a controlling holding to select a purchaser whose ideas as regards the way the

company is to be directed are reasonably compatible with his own. It is also natural that a purchaser of a substantial holding in a company should press for board representation and perhaps make the vendor's support for this a condition of purchase. Accordingly, these factors, divorced from any other evidence of a significant degree of control over the retained voting rights, would not lead the Executive to conclude that a general offer should be made.

7A. Placing

The Executive would not give its consent to the acquisition of a holding of 30% or more by a person in conjunction with arrangements by the purchaser to place sufficient voting rights to reduce the holding below 30%.

When a purchaser acquires just under 30% of the voting rights of a company, it is the prime responsibility of the purchaser to ensure that it and parties acting in concert with it will not hold an aggregate of 30% or more of the voting rights of the company as a result of the acquisition. In the event that such voting rights would result in the concert group holding in aggregate 30% or more of the voting rights of the company a mandatory offer obligation will be triggered under this Rule 26.

Other general interpretations

8. The chain principle

Occasionally, a person or group of persons acting in concert acquiring statutory control of a company (which need not be a company to which the Takeovers Code applies) will thereby acquire or consolidate control, as defined in the Codes, of a second company because the first company itself holds, either directly or indirectly through intermediate companies, a controlling interest in the second company, or holds voting rights which, when aggregated with those already held by the person or group, secure or consolidate control of the second company. The Executive will not normally require an offer to be made under this Rule 26 in these circumstances unless either:–

(a) the holding in the second company is significant in relation to the first company. In assessing this, the Executive will take into account a number of factors including, as appropriate, the assets and profits of the respective companies. Relative values of 60% or more will normally be regarded as significant; or

(b) one of the main purposes of acquiring control of the first company was to secure control of the second company.

The Executive should be consulted in all cases which may come within the scope of this Note to establish whether, in the circumstances, any obligation arises under this Rule 26.

"Statutory control" in this Note means the degree of control which a company has over a subsidiary.

9. Triggering a mandatory offer during a voluntary offer

If it is proposed to incur an obligation under this Rule 26 during the course of a voluntary offer by the acquisition of voting rights, the Executive must be consulted in advance. Once such an obligation is incurred, an offer in compliance with this Rule 26 must be announced immediately.

If no change in the consideration is involved it will be sufficient, following the announcement, simply to notify offeree company shareholders in writing of the new total holding of the offeror, of the fact that the acceptance condition in the form required by Rule 26.2 is the only condition remaining, and of the period for which the offer will remain open following posting of the document.

An offer made in compliance with this Rule 26 must remain open for not less than 14 days following the date on which the document is posted to offeree company shareholders.

Notes 3 and 4 to Rule 16.1 set out certain restrictions on the incurring of an obligation under this Rule 26 during the offer period.

10. Convertible securities, warrants and options

In general, the acquisition of convertible securities, warrants or options does not give rise to an obligation under this Rule 26 to make an offer but the exercise of any conversion or subscription rights or options will be considered to be an acquisition of voting rights for the purpose of this Rule 26.

The Executive will, however, give special consideration to the granting and taking of options, and will have regard to the time when the option is exercisable, whether the grantor of the option has also sold part of his holding (see Note 7 to this Rule 26.1), the consideration paid for the option, and any other circumstances in which the relationship and arrangements between the two parties concerned are such that effective control over underlying voting rights has or may have passed to the taker of the option. Where the Executive takes the view that effective control over the voting rights has passed, it will treat the grant of the option as constituting an acquisition of the voting rights.

The Executive will not normally require an offer to be made following the exercise of convertible securities, warrants, options or other subscription rights in respect of new securities provided that the issue of convertible securities, warrants or options to the person exercising the rights is approved by a vote of independent shareholders in general meeting in the manner described in Note 1 on dispensations from Rule 26.

Any holder of conversion or subscription rights who intends to exercise such rights and so to hold 30% or more of the voting rights of a company (or to have acquired more than 2% of such voting rights in any 12 month period) should consult the Executive before doing so to determine whether an offer obligation would arise under this Rule 26 and if so at what price. (See also Note 2(c) to Rule 26.3.)

Where there are conversion or subscription rights currently capable of being exercised, this Rule 26 is invoked at a level of 30% of the existing voting rights. Where they are capable of being exercised during an offer period, Note 2 to Rule 6 and Note 3 to Rule 30.2 will be relevant. (See also Note 18 to this Rule 26.1.)

11. The 2% creeper - acquisitions and dispositions of voting rights during 12 month period

A person, or group of persons acting in concert, holding 30% or more of the voting rights of a company is free to acquire and dispose of further voting rights within a band of 2% above the greater of 30% or its lowest percentage holding of voting rights in the previous 12 month period without incurring an obligation to make a general offer. Within this band dispositions of voting rights may be netted off against acquisitions thereof.

12. The 2% creeper - effect of dispositions

If a person, or group of persons acting in concert, holding 30% or more of the voting rights of a company disposes of voting rights in circumstances other than those mentioned in Note 11 to this Rule 26.1, the reduced holding establishes a new lowest percentage holding for purposes of the 2% creeper. As a result, an obligation to make a general offer will arise if:-

(i) the reduced holding is 30% or more and is increased by net acquisitions of voting rights by more than 2% in any 12 month period, or

(ii) following a reduction of the holding below 30% it is increased to 30% or more.

Except as mentioned in Note 11 to this Rule 26.1, dispositions of voting rights may not be netted off against acquisitions thereof.

13. The 2% creeper - effect of dilution

Subject to Note 14 to this Rule 26.1, the dilution of a holding of voting rights by the issue of new shares or otherwise will normally be regarded by the Executive as equivalent to a reduction by way of a disposition of voting rights.

14. The 2% creeper - placing and top-up transactions

For purposes of the creeper a placing shareholder who conducts a placing and top-up transaction pursuant to Note 6 on dispensations from Rule 26 shall be deemed to have a lowest percentage holding equal to the lower of the lowest percentage holding which the placing shareholder had in the 12 month period prior to or immediately after the placing and top-up transaction. A placing shareholder will be treated similarly if the top-up transaction does not give rise to an offer under this Rule 26 but the transaction complies with the requirements of Notes 6 or 7 on dispensations from Rule 26.

Where a placing shareholder has completed a whitewashed transaction within the 12 months immediately before the placing and top-up transaction, Note 15 to this Rule 26.1 should be read together with this Note for the purpose of determining the lowest percentage holding which the placing shareholder had in that 12 month period.

15. The 2% creeper - effect of whitewash

When a person, or group of persons acting in concert, would otherwise be obliged to make a mandatory offer pursuant to this Rule 26 but the obligation is waived pursuant to a vote of independent shareholders in accordance with the terms of Note 1 on dispensations from Rule 26, such person, or group of persons, shall be deemed to have a lowest percentage holding equal to the percentage holding of such person, or group of persons, immediately after the whitewashed transaction. Any acquisition of additional voting rights by such person, or group of persons, subsequent to the whitewashed transaction shall be subject to the 2% creeper under Rule 26.1 by reference to the lowest percentage holding in the 12 month period ending on the date of the completion of the relevant acquisition. (See also Notes 11 and 12 to this Rule 26.1.)

By way of example, if a person, or group of persons acting in concert, originally holding 31% comes to hold 38% of the voting rights of a company as a result of a whitewashed transaction, such person or group of persons would be deemed to have a lowest percentage holding of 38% and thereby be free to acquire voting rights within the 2% band above 38% in the following 12 month period, unless any disposal of voting rights causes the lowest percentage holding of such person or group of persons to fall below 38%.

16. The 2% creeper - voting rights acquired during mandatory offer

For purposes of the 2% creeper, following a mandatory offer which does not become unconditional an offeror shall be deemed to have a lowest percentage holding equal to his aggregate holding of voting rights of the offeree company at the close of the offer period, including any voting rights which he acquired during the offer.

17. The 2% creeper - holdings between 48% and 50%

It should be noted also that the restriction in Rule 26.1(c) and (d) applies to any immediately preceding 12 month period if at any time during such period a person, or group of persons acting in concert, holds 50% or less of the voting rights. Thus, a person or group of persons with 49% of the voting rights of a company will be restricted from acquiring more than a further 2% of the offeree company's voting rights (resulting in a total of 51%) for a period of 12 months thereafter.

18. Allotted but unissued shares

When shares of a company carrying voting rights have been allotted (even if only provisionally) but have not yet been issued, for example, under a rights issue when the shares are represented by renounceable letters of allotment, the Executive should be consulted.

19. Discretionary clients

Dealings for discretionary clients by fund managers connected with an offeror or the offeree company, unless they are exempt fund managers, may be relevant (see Rule 21.6).

20. Employee benefit trusts

The Executive must be consulted in advance of any proposed acquisition of new or existing shares if the aggregate holdings of the directors, any other shareholders acting, or presumed to be acting, in concert with any of the directors and the trustees of an employee benefit trust ("EBT") will, as a result of the acquisition, equal or exceed 30% of the voting rights or, if already exceeding 30% will increase further. The Executive must also be consulted in any case where a shareholder (or group of shareholders acting, or presumed to be acting, in concert) holds 30% or more (but not more than 50%) of the voting rights and it is proposed that an EBT acquires shares.

The mere establishment and operation of an EBT will not by itself give rise to a presumption that the trustees are acting in concert with the directors and/or a controlling shareholder (or group of shareholders acting, or presumed to be acting, in concert). The Executive, will, however,

consider all relevant factors including: the identities of the trustees; the composition of any remuneration committee; the nature of the funding arrangements; the percentage of the issued share capital held by the EBT; the number of shares held to satisfy awards made to directors; the number of shares held in excess of those required to satisfy existing awards; the prices at which, method by which and persons from whom existing shares have been or are to be acquired; the established policy or practice of the trustees as regards decisions to acquire shares or to exercise votes in respect of shares held by the EBT; whether or not the directors themselves are presumed to be acting in concert; and the nature of any relationship existing between a controlling shareholder (or group of shareholders acting, or presumed to be acting, in concert) and both the directors and the trustees. Its consideration of these factors may lead the Executive to conclude that the trustees are acting in concert with the directors and/or a controlling shareholder (or group).

This Note will not apply in respect of shares held within the EBT but controlled by the beneficiaries.

DEFINITIONS TO THE CODES ON TAKEOVERS AND MERGERS AND SHARE REPURCHASES

Acting in concert: Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate to obtain or consolidate "control" (as defined below) of a company through the acquisition by any of them of voting rights of the company.

Without prejudice to the general application of this definition, persons falling within each of the following classes will be presumed to be acting in concert with others in the same class unless the contrary is established:-

(1) a company, its parent, its subsidiaries, its fellow subsidiaries, associated companies of any of the foregoing, and companies of which such companies are associated companies;

(2) a company with any directors (together with their close relatives, related trusts and companies controlled[#] by any of the directors, their close relatives or related trusts) of it or of its parent;

(3) a company with any of its pension funds, provident funds and employee share schemes;

Note: Class (3) does not apply to an employee benefit trust. The Executive will apply Note 20 to Rule 26.1 to determine whether the directors and shareholders of a company are acting in concert with the trustees of an employee benefit trust of the same company.

(4) a fund manager (including an exempt fund manager) with any investment company, mutual fund, unit trust or other person, whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;

(5) a financial or other professional adviser (including a stockbroker)* with its client in respect of the shareholdings of the adviser and persons controlling[#], controlled by or under the same control as the adviser (except in the capacity of an exempt principal trader);

(6) directors of a company (together with their close relatives, related trusts and companies controlled[#] by such directors, their close relatives and related trusts) which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent;

(7) partners;

(8) an individual (including any person who is accustomed to act in accordance with the instructions of the individual) with his close relatives, related trusts and companies controlled[#] by him, his close relatives or related trusts; and

(9) a person, other than an authorised institution within the meaning of the Banking Ordinance (Cap. 155) lending money in the ordinary course of business, providing finance or financial assistance (directly or indirectly) to any person (or a person acting in concert with such a person) in connection with an acquisition of voting rights (including any direct or indirect refinancing of the funding of the acquisition).

[#] See Note 1 at the end of the definitions.
** See Note 2 at the end of the definitions.*

Notes to the definition of acting in concert:

1. Classes (1) and (8)

If an individual owns or controls 20% or more of the voting rights of a company in class (1), he and one or more other persons falling within class (8) will be presumed to be acting in concert with one or more persons in class (1) unless the contrary is established.

2. Full information required

In cases where the question of whether parties are acting in concert is being investigated, relevant parties will be required to disclose all relevant information including their dealings in the relevant securities of the offeree company or potential offeree company. Failure to do so may result either in disciplinary proceedings or in an inference being drawn that they are acting in concert.

3. Break up of concert parties

When a ruling or admission has been made that a group of persons is or has been acting in concert, it will be necessary for clear evidence to be presented before it can be accepted that they are no longer acting in concert.

4. Consortium offers

Investors in a consortium formed for the purpose of making an offer (e.g. through a vehicle company) will normally be treated as acting in concert with the offeror. Where such an investor is part of a larger organisation, the Executive should be consulted to establish which other parts of the organisation will also be regarded as acting in concert. (See also the definitions of connected fund manager and connected principal trader and Rule 21.6 regarding discretionary fund managers.)

5. Irrevocable undertakings and warranties

Where a shareholder gives an irrevocable undertaking to an offeror to accept his offer (or, in the case of a scheme of arrangement, to vote in favour of the relevant resolution to approve such scheme of arrangement) and/or provides warranties to an offeror in relation to the offeree company, the giving of the irrevocable undertaking and/or the warranties will not, of itself and in the absence of any

other factor, lead to the presumption that the shareholder is acting in concert with that offeror.

6. Standstill agreements

Agreements between a company, or the directors of a company, and a shareholder which restrict the shareholder or the directors from either offering for, or accepting an offer for, the shares of the company or from increasing or reducing shareholdings, may be relevant for the purpose of this definition. In cases of doubt, the Executive should be consulted. (See Rule 33.2.)

7. Class (6) - whitewashes

For the purposes of class (6), an offer includes a transaction which is to be the subject of a whitewash application.

8. Close relatives

For the purposes of classes (2), (6) and (8) "close relatives" shall mean a person's spouse, de facto spouse, children, parents and siblings.

9. Underwriting arrangements

The relationship between an underwriter (or sub-underwriter) of a cash alternative offer and an offeror may be relevant for the purpose of this definition. Underwriting arrangements on arms' length commercial terms would not normally amount to an agreement or understanding within the meaning of acting in concert. The Executive recognises that such underwriting arrangements may involve special terms determined by the circumstances, such as weighting of commissions by reference to the outcome of the offer. However, in some cases, features of underwriting arrangements, for example the proportion of the ultimate total liability assumed by an underwriter, the commission structure or the degree of involvement of the underwriter with the offeror in connection with the offer, may be such as to lead the Executive to conclude that a sufficient level of understanding has been created between the offeror and the underwriter to amount to an agreement or understanding within the meaning of acting in concert. In cases of doubt, the Executive should be consulted.

A purchaser may be prepared to acquire part only of a holding, particularly where he wishes to acquire under 30%, thereby avoiding an obligation under Rule 26 to make a general offer. The Executive will be particularly concerned in such cases to see that underwriting arrangements made by a vendor do not amount to an agreement or understanding with the purchaser within the meaning of acting in concert.

10. Transfer of voting rights as a gift or at nominal consideration

In cases where a person transfers voting rights, in whole or in part, to another

person, as a gift or for nominal consideration, the transferor and transferee will be presumed to be acting in concert under class (9). Class (9) does not normally apply to a charitable body exempt under the Inland Revenue Ordinance (Cap. 112). The Executive should be consulted in the case of charitable bodies established under overseas jurisdictions.

INTRODUCTION TO THE CODES ON TAKEOVERS AND MERGERS AND SHARE REPURCHASES

8. Applications for rulings

8.1 Any application for a ruling under either of the Codes should take the form of a written submission addressed to the Executive Director, Corporate Finance Division of the SFC. The submission should be comprehensive and contain all relevant information which the Executive will require to render a fully informed decision. Such information should normally include the following:-

(a) Summary

The ruling being sought, and any alternative courses of action, should be clearly described, and the issues for consideration summarised. The relevant sections of the Codes should be identified.

(b) Parties

All parties with a material interest in the submission, and their respective financial and legal advisers, should be identified.

(c) Material Facts

All material facts relevant to the application should be stated and should include, as appropriate, the following information:-

(i) a description of the proposed transaction including the timetable for implementation, related regulatory requirements and the reasons and commercial rationale for the transaction;

(ii) where known after reasonable inquiry, a description of the relevant offeror and the offeree company including their places of incorporation, a description of their capital structures, group structures, businesses and assets, and the identities of their controlling and substantial shareholders, accompanied by a structural chart depicting the structure of the relevant offeror and the offeree company and the interests of such shareholders, both before and after implementation of the proposed transaction;

(iii) a historical chronology of related events;

(iv) the controlling shareholders' interests in the relevant offeror, the offeree company and the proposed transaction;

(v) the interest which directors of the relevant offeror and the offeree company have in the proposed transaction;

(vi) the effect which the proposed transaction will have on the relevant offeror and the offeree company;

(vii) steps to be taken, if any, to safeguard the interests of any independent shareholders;

(viii) a description of financing arrangements for the proposed transaction;

(ix) where known after reasonable inquiry, details of any dealings in securities of the offeree company by the relevant offeror, the directors and substantial shareholders of the relevant offeror and the offeree company, and all persons acting in concert with any of them, for the 6 month period immediately preceding the date of the application; and

(x) a description of the terms and conditions of material contracts.

(d) Issues for Consideration

The issues for consideration by the Executive should be described and analysed, and all arguments advanced in support of the ruling being sought.

8.2 A crossed cheque payable to the SFC in the amount of the fee, if any, payable pursuant to the Securities and Futures (Fees) Rules should be enclosed with the submission and, where applicable, the submission should include a brief description of the way in which the fee was calculated. A copy of extracts from Parts 3 and 5 and Schedule 2 of the Securities and Futures (Fees) Rules is attached as Schedule IV of the Codes.

8.3 Each submission should be signed by the applicant and should close with a statement certifying the truth, accuracy and completeness of statements contained in the submission. When the application is filed by an adviser, the statement should confirm that the applicant has authorised the filing of the application by the adviser. Such statement does not relieve the adviser of its obligation to use all reasonable efforts to ensure that its client understands, and abides by, the relevant requirements of the Codes, and that the submission of its client is true, accurate and complete.